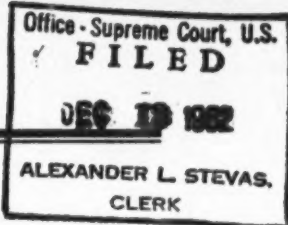


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NO.



**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

JOHN WAYNE TONUBBEE,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, consistent with the Fourth and Fourteenth Amendments to the United States Constitution, a request by a co-occupant of a home to accompany armed police officers into the home in order to awaken the petitioner whom he feared would be shot, can be construed as a consensual entry to effect a warrantless arrest and seizure?

2. Whether, consistent with the Fifth and Fourteenth Amendments to the United States Constitution, in a case based on circumstantial evidence, specific intent to kill or inflict great bodily harm upon more than one person may be established by photographs of the decedents who had been struck by a vehicle, no proof being offered that the fatal wounds were anything other than would have been suffered in a highway accident?

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John Wayne Tonubbee petitions for a writ of certiorari to review the judgment of the Supreme Court of Louisiana affirming his convictions under LSA R.S. 14:30 for first degree murder.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana (App. A) is reported at 420 So2d 126 (La., 1982). The 29th Judicial District Court opinion is unreported.

JURISDICTION

The judgment of the Supreme Court of Louisiana

(App. A) was entered on September 7, 1982. On October 15, 1982, the Supreme Court of Louisiana denied a petition for rehearing with one dissenting opinion issued on October 21, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. §1257.¹

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment of the United States Constitution provides in part:

"Nor shall any person...be deprived of life, liberty, or property, without due process of law..."

The Fourteenth Amendment of the United States Constitution provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

¹ No other petitioner is involved in this petition.

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.....

STATEMENT OF THE CASE

John Wayne Tonubbee, an American Indian, was convicted at a jury trial on a two count indictment alleging first degree murder in violation of LSA R.S. 14:30(3).² He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

On the morning of April 20, 1980, Tonubbee was roused from his bed by five armed police officers and taken to headquarters where he was charged with two counts of second degree murder. He was later indicted for the first degree murders of Leo Dufrene and Pauline Odom who had been struck and killed by a vehicle on Highway 90 shortly before midnight on April 19, 1980.

Answers to Bills of Particulars filed by the District Attorney's Office and the Attorney General's Office which took over prosecution after the recusal of the District Attorney stated Tonubbee was arrested at his home on Bayou Gauche at approximately 6:45 or 6:49 a.m. Tonubbee shared the residence, which belonged to his employer Jack

² LSA R.S. 14:30(3) provides first degree murder is the killing of a human being:

(3) when the offender has a specific intent to kill or to inflict great bodily harm on more than one person.

Allen, with Roy Stapleton. Stapleton was outside the house when the first officer arrived. He testified that when he saw the officer squat behind his unit, with a shotgun, he asked what was going on. (Volume 9, March 18, 1981, Pages 12:13).³

A And he said he was lookin' for Wayne Tonubbee, and I says, "Well there's no Wayne Tonubbee here but there's a Wayne Thompson is here," and he said he says, "Well is he in the house?" And I said, "Yes, he's in the house asleep as far as I know." And he got up-tight and he was calling other officers, and I was asking him, "What's wrong? What happened?" You know, he really didn't explain that. He says, "Are there any guns in the house?" I says, "Yes," and I said, "I have a pistol in the house." He said, "Well can you go get it?" And I says, "Yeah. I can go get it." So I walked in the house and I put the pistol in my pocket.

Q And then what happened?

A And he was squatting down behind the car at this time with a shotgun, and I said, "Man, tell me what's going on."

Q Was he the only policeman there?

A He was the only one there. He had radioed for others.

Q Do you know his name?

³ Because the Clerk of Court did not use consecutive pagination in the record certified and lodged with the Louisiana Supreme Court, it is necessary to cite the volume and page number of the record.

A No. I don't. He's approximately sixty years old. I think he was grey-headed. I'm not sure.

Q Okay. Then what happened?

A Then he told me that they wanted Wayne for murder. "Well tell me," you know. I couldn't understand that. So he told me that he was in a truck and he had run over some people, and I said, "Well, I don't know about that, but let's don't go in the house and shoot the man." And so I told 'um after,—He waited until the rest of them showed up, a couple of squad cars, and I said, "Let me go in with you and wake him up," and they said, "Okay." So I went on in and I said, "Hey, Wayne,"—And all of 'um were behind me then, and—

Stapleton then accompanied the armed officers into the house and they were all present when he woke Tonubbee. All remained in the room while he dressed. It was determined by the officers that he was putting on the clothes he wore the night before and they were introduced into evidence at trial as were statements allegedly made in the police unit on the way to the Sheriff's Office. Photographs made during booking were used in photographic lineups and were introduced into evidence.

The question of the illegality based on the Fourth Amendment was raised by Motion to Suppress filed September 4, 1981. It was denied on April 23, 1981 (Appendix C). The issue was raised to the Louisiana Supreme Court by Assignment of Error #2, in petitioner's brief, oral argument and Application for Rehearing.

At the trial level and in its original brief to the Louisiana Supreme Court, the petitioner based his argument on the warrantless non-consensual entry into the home without probable cause or exigent circumstances. The Louisiana Supreme Court held (Appendix A) the police entered the house with the consent of one of its occupants, Roy Stapleton, an issue not alleged by the prosecution in the court below. Petitioner further briefed the consent issue in its Application for Rehearing.

After Tonubbee's conviction, a Motion for New Trial was filed alleging that the verdict is contrary to the law and the evidence in that no evidence was presented by the State at trial of a specific intent to kill or inflict great bodily harm upon more than one person as is required by LSA R.S. 14:30(3). The issue was again raised in petitioner's Assignments of Error Nos. 27 and 28 to the Louisiana Supreme Court, in petitioner's brief and oral argument and in the Application for Rehearing.

According to the coroner's testimony, both Odom and Dufrene died from numerous major injuries consistent with having been struck by an automobile or truck. (Volume 3, page 220).

The prosecution introduced at trial three color photographs of the body of Pauline Odom, a visitor in St. Charles Parish and six color photographs of the victim Leo Dufrene, a prominent local resident and restaurateur. The State refused a defense offer to stipulate as to the victim's

injuries and location of the bodies unless the defense also stipulated to a showing of specific intent to kill. (Volume 6, page 218). The Louisiana Supreme Court held the photographs relevant to show specific intent. *State v. Tonubbee* 420 so2d 126. No other evidence of specific intent to kill or inflict great bodily harm on Leo Dufrene is contained in the record, as is noted by Justice Watson in his dissent to the denial of rehearing. *State v. Tonubbee*, 420 So2d 126 at p. 139. The only other evidence remotely bearing on specific intent to kill Pauline Odom is a statement allegedly made by the defendant to Odom in a bar earlier the night the deaths occurred. According to a prosecution witness, Tonubbee told Odom "Either you get up and you go with me or I am going to knock your butt down and take you with me." (Volume 5, April 27, 1981, page 11).

LSA R.S. 14:30(3) requires a specific intent to kill or to inflict great bodily harm on more than one person to sustain a first degree murder conviction. The entire case was based on circumstantial evidence.

REASONS FOR GRANTING THE WRIT

The decision of the Louisiana Supreme Court should be reviewed, pursuant to Rule 17(c), because the Louisiana court found a consent to enter the house to have been given by the petitioner's housemate under conditions which were at best coercive and for this reason refused to apply *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 137 (1980).

Additionally, in a case based on circumstantial evidence, the Louisiana Supreme Court, while citing no evidence whatsoever from which specific intent could be inferred, found *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979) to have been satisfied. The prosecution had argued before both the Louisiana Supreme Court and the trial court that photographs of the bodies of the two victims, killed by a vehicle, showed that specific intent to kill or inflict great bodily harm upon more than one person.

This Court has consistently held that absent consent or exigent circumstances, the entry of a home to conduct a warrantless search or arrest to be unreasonable under the Fourth Amendment. *Steagald v. United States*, __ U.S. __, 101 S.Ct. 1642 (1981) and *Payton v. New York*, *supra*.

In the instant case, the "consent" given by Roy Stapleton was at most assumed by the officers but in reality coerced. The circumstances surrounding the arrest show that the defendant was asleep, that his housemate was confronted first with one officer carrying a shotgun who was joined by four other armed officers and that he was concerned for the safety of his friend. (Volume 9 pp. 12-13 March 18, 1981).

This Court held in *Schneklath v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973) at p. 227:

"But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit

or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the result "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."

To allow this consent, assumed, implied or coerced, to validate the arrest of the defendant, in a factual situation in which the *Payton* decision would clearly apply is to create an exception to *Payton* not supported by other opinions of this Court.

As to the question of sufficiency of evidence of specific intent to kill or inflict great bodily harm on more than one person, as required to support a first degree murder conviction under Louisiana law, *Jackson v. Virginia*, supra, places the burden of proving specific intent beyond a reasonable doubt on the prosecution. The prosecution contended that photographs of the victims showed specific intent.

The coroner testified that the injuries which caused the deaths of both victims were consistent with having been struck by an automobile or truck. (Volume 3 p. 220).

In his dissenting opinion from the denial of a rehearing before the Louisiana Supreme Court, Justice Watson stated:

"The facts appear as compatible with negligent homicide as first degree murder, especially as to

Dufrene. The record, while somewhat sketchy as to defendant's implication in Odom's death, is almost entirely silent as to the circumstances of Dufrene's; about the only indication is that Dufrene was hit by the pickup truck, which certainly falls far short of proving an intentional killing, beyond a reasonable doubt. The facts should be re-examined."

The Due Process Clause requires no less.

CONCLUSION

John Wayne Tonubbee was arrested without a warrant, with entry into his home made by the officers based on the coerced consent of co-occupant of the home and was convicted of first degree murder under a statute requiring the specific intent to kill or inflict great bodily harm on more than one person with only photographs which showed injuries to the victims consistent with negligent homicide to show specific intent. We urge the Court to grant the writ.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that copies of the Petition for Writ of Certiorari have been served upon the United States of America by placing three copies thereof in the United States Mail, postage prepaid, addressed to The Honorable William J. Guste, Jr., Attorney General, State of Louisiana, 1885 Wooddale Blvd., Baton Rouge, La. 70806. I further certify that all parties required to be served have been served.

New Orleans, Louisiana, this _____ day of December, 1982.

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